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No. 73 - 476

In the Supreme Court of the United States

October Term, 1973

SEYMOUR GROSS,
Petitioner

vs.

MEDICAL MUTUAL OF CLEVELAND, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The
United States Court of Appeals
for the Sixth Circuit

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Cleveland, Ohio 44114

Seymour Gross
Counsel of Record

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STATUTES

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OF THE UNITED STATES

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No.

SEYMOUR GROSS,
Petitioner,

vs.

MEDICAL MUTUAL OF CLEVELAND, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Seymour Gross, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on the June 14, 1973.

OPINIONS BELOW

The Circuit Court of Appeals for the Sixth Circuit did not write an opinion. The judgment of the Circuit Court of Appeals is printed in Appendix A hereto, infra, page 14. The Journal Entry of Judgment of the United States District Court for the Northern District of Ohio is printed in Appendix A hereto, infra, page 15. The Journal Entry of Judgment of the United States Court for the Northern District of Ohio in the prior suit is printed in Appendix A hereto, infra, page 19.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 14, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does a dismissal by a District Court "for lack of jurisdiction" operate as an adjudication upon the merits so as to constitute res judicata?

2. Does a District Court have jurisdiction over a suit against a fiscal agent employed by the Secretary of Health, Education and Welfare for the withholding or suspension by said agent of payments due medicare subscribers when it is alleged that the withholding or suspension is without statutory authority and in violation of the constitution?

STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 41 (b) provides:

> Involuntary Dismissal: Effect Thereof. For failure of the

plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise

> specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (Underscoring supplied)

STATEMENT

This is a class action, under the Civil Rule 23, on behalf of Medicare subscribers, to recover interest or damages from the defendant, Medical Mutual of Cleveland, Inc. Plaintiff claims that defendant arbitrarily, unreasonably, unlawfully, through gross negligence and abuse of descretion, withheld payment to Medicare subscribers of sums due them for medical expense, said retention by Medical Mutual being con-

trary to the constitutional right and privilege of said subscribers. Subscribers are entitled to sue Medical Mutual as they are third-party beneficiaries of the contract between Medical Mutual and the Secretary of Health, Education and Welfare.

Prior to the institution of the action, plaintiff brought an action in the state court, said action being removed to the District Court, where the defendant's motion to dismiss was granted for lack of jurisdiction. (The Court stated as its reason that there was no specific federal statute granting the Court jurisdiction and that the case was an unconsented suit against the United States of America).

The defendant, in the instant action, filed a Motion to Dismiss, which the District Court treated as a motion

for summary judgment and granted, holding that the granting of the Motion to Dismiss the initial suit constituted "res judicata." The Court of Appeals for the Sixth Circuit affirmed the District Court without an opinion.

REASONS FOR ALLOWANCE OF THIS WRIT

1. The holding that the prior suit (dismissed for lack of jurisdiction) was res judicata is a direct contradiction of an express provision of Rule 41 (b) of the Federal Rules of Civil Procedure whrein "dismissal for lack of jurisdiction" is excluded from the operation of the rule. The holding also is in conflict with the decisions of this Court in the following cases:

Bell v. Hood, 327 U.S. 687

Costello v. United States, 365

U.S. 265.

In Bell the Court said (at page 282):

> "...Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy...." (Underscoring supplied)

At page 683:

> "...and the complaint does raise serious questions, both of law and fact, which the District Court can decide only after it has assumed jurisdiction over the controversy..." (Underscoring supplied)

In Costello the Court said:

> "At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent

action on the same claim. In Haldeman v. United States, 91 US 584, 585, 586, 23 L ed 433, 434, which concerned a voluntary nonsuit, this Court said, "there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit.... There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively." A similar view applied to many dismissals on the motion of a defendant. In Hughes v. United States (US) 4 Wall 232, 237, 18 L ed 303, 305, it was said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point

of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See also House v. Mullen (US) 22 Wall 42, 46 22 L ed 838, 839; Swift v. McPherson, 232 US 51 56, 58 L ed 499, 503, 34 S Ct 239; St. Romes v. Levee Steam Cotton Press Co. 127 US 614, 619, 32 L ed 289, 291, 8 S Ct 1335; Burgett v. United States (CA7 Ill) 80 F2d 151, 104 ALR 167; Gardner v. United States (CA9 Cal) 71 F2d 63.

"We do not discern in Rule 41 (b) a purpose to change this common law principle with respect to dismissals

> in which the merits could not be reached for failure of the plaintiff to satisfy a precondition...." (Underscoring supplied)

2. The dismissal of the original suit by the District Court for lack of jurisdiction was contrary to the decision of the Court of Appeals for the Second Circuit in Aquavella v. Richardson, 437 F.2d 397, wherein it was held (at page 405):

> "In the light of these considerations we conclude that the suspension of payments to plaintiffs under the Medicare Act with no formal action thereafter for many months is a reviewable final agency action and that the district court's dismissal of the amended complaint was error."

The Second Circuit cited Gonzalez vs. Freeman, 118 U.S. App. D.C. 180, wherein it was held that agency

action, challenged as a denial of due process "is immune from judicial review, if ever, only be the plainest manifestation of congressional intent to that effect."

The general principal governing immunity was laid down by this Court in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (at page 687):

> "...it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal action, that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is therefore no jurisdiction difficulty...."

CONCLUSION

1. The instant suit is not barred by the prior dismissal for want of jurisdiction over the subject matter as the doctrine of "res judicata" requires that the first decision must be on the merits to constitute a bar to another suit.

2. The District Court has jurisdiction to hear the instant case under the Administrative Procedure Act. The instant suit is not barred by "sovereign immunity, as it seeks neither injunctive relief against the government, government property nor government money."

Respectfully submitted,

Seymour Gross
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Cleveland, Ohio 44114
(Tel. 216 - 696-5060)

APPENDIX A

Judgment of the Circuit Court of Appeals

(Filed June 14, 1973)

No. 73-1227

UNITED STATES CIRCUIT
COURT OF APPEALS FOR
THE SIXTH CIRCUIT

SEYMOUR GROSS,
Plaintiff-Appellant

vs.

MEDICAL MUTUAL OF
CLEVELAND, INC.,
Defendant-Appellee

ORDER

Before: Weick and McCree, Circuit Judges, and O'Sullivan, Senior Circuit Judge

The appeal and summary judgment having come on to be heard, upon consideration, it is ORDERED that the judgment be, and it hereby is AFFIRMED.

Entered by order of the court,
/s/ James A. Higgins
Clerk

Judgment of the United States District Court for the Northern District of Ohio

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(Filed Jan. 16, 1973)

Civil No. C72 - 1295

MEMORANDUM, OPINION AND ORDER

Seymour Gross,

Plaintiff

vs.

Medical Mutual of Cleveland, Inc.,

Defendant

KRUPANSKY, J.

This is an action by petitioner and the purported class he represents seeking compensatory damages from the defendnant Medical Mutual of Cleveland, Inc., an agent of the United States, for an alleged failure of the defendant to "expeditiously" or "promptly or properly" process and pay claims of Medicare

subscribers, as set forth in 42 U.S.C. SS1395, et seq. Defendant's Motion to Dismiss will be treated as a Motion for Summary Judgment as provided for in Rule 12(d) (6) of the Federal Rules of Civil Procedure.

In support of the motion defendant raises a number of allegations, the principal one being that the Order of Judge Thomas D. Lambros, dated December 18, 1971, in the case of Seymour Gross v. Medical Mutual of Cleveland, Inc., C71-551, acts to bar the institution of this suit based upon the doctrine of res judicata. Plaintiff has failed to file a timely response to defendant's motion.

In Harrison v. Blumfield Building Industries Inc., 435 F. 2d 1192 (6th Cir. 1970), the Court applied res

judicata and collateral estoppel to preclude a second suit for damages even though the plaintiffs in that case were not parties to the prior action. In upholding the trial court's approval of a motion for summary judgment, the Court stated:

> . . . . res judicata bars a second suit between the same parties and their privies on the same cause of action as to all issues which were or could have been litigated in the former suit... (emphasis added). Supra, at 1195.

The plaintiff having failed to set forth a specific fact showing a genuine issue for trial, and having further failed to show why the judgment of the Court in Case No. C71-551 is not binding upon him, defendant's Motion for

Summary Judgment is hereby granted. Harrison v. Blumfield Building Industries Inc., supra; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F. 2d 425 (6th Cir. 1962).

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

Judgment of the United States District Court for the Northern District of Ohio (PRIOR SUIT)

(Filed Dec. 19, 1971)

Civil No. C71 - 551

MEMORANDUM, OPINION AND ORDER

Seymour Gross, Executor of the Estate of Dora Gross, Deceased,

Plaintiff

vs.

Medical Mutual of Cleveland, Inc.,

Defendant

LAMBROS, DISTRICT JUDGE

The plaintiff in this cause is seeking payment and interest on medical bills submitted to the defendant under the provisions of the Medicare Program or, in particular, under the provisions of Medicare concerning "Supplementary Medical Insurance Program for the Aged."

42 U.S.C. S1395j, et seq. The case was originally filed in the Common Pleas Court of Cuyahoga County, Ohio. Thereafter, the defendant removed the lawsuit to this District Court. The plaintiff has moved to remand this cause to the Common Pleas Court of Cuyahoga County, Ohio. The defendant, on the other hand, has moved to dismiss the complaint upon the ground of lack of subject matter jurisdiction and of failure to state a claim upon which relief may be granted.

The motion to remand is denied. Since the defendant was acting as an agent of the Secretary of Health, Education and Welfare in administering the benefit provisions of 42 U.S.C. S1395 et seq., this action was properly removed under 28 U.S.C. S1442(a) (1). Kuenstler v. Occidental Life Ins. Co., 292 F. Supp.

532, 535 (C.D.Xal. 1968).

As for the motion of the defendant to dismiss, after considering the pertinent statutory provision, 42 U.S.C. S1395, and the case law developed under this provision, see Schroeder Nursing Case, Inc. v. Mutual of Omaha, Ins., 311 F.Supp. 405 (E.D.Wis. 1970); Cardno v. Finch, 311 F.Supp. 251 (E.D. La. 1970); Kuenstler v. Occidental Life Ins., 292 F.Supp. 532 (C.D.Cal. 1968), the Court finds that the motion is well taken.

There is no specific federal statute which grants this Court jurisdiction to review the actions of the defendant in administering the voluntary insurance program of Medicare as an agent of the United States of America. Section 1395ff, Title 42 of the United

States Code clearly does not provide for such review. Rather, the remedies provided therein appear to be exclusive. See Kuenstler v. Occidental Life Ins., 292 F.Supp. 532, 536-37 (C.D.Cal. 1968), quoting, Report of the Committee on Finance, Senate Report No. 404, pages 54-55. Moreover, the plaintiff has not cited to this Court nor has this Court found any provision of the United States Code which would provide for such review. The Court, therefore, does not have jurisdiction over this case.

The Court also lacks jurisdiction over this case in another respect. As explained in the Kuenstler case, this action is in essence an uncontested suit against the United States of America and as such, the Court lacks jurisdiction over the parties. Id. at 537.

Accordingly, for the above reasons, the motion to dismiss is granted. The complaint is hereby dismissed.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States District Judge

PROOF OF SERVICE

I, Seymour Gross, counsel for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of September, 1973, I served three (3) copies of the foregoing Petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington, D.D. 20530, by mailing the same, in a duly addressed envelope, with first class postage prepaid.

Seymour Gross

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Cleveland, Ohio 44114

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SUPREME COURT, U. S.

No. 73-476

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SEYMOUR GROSS, PETITIONER

v.

MEDICAL MUTUAL OF CLEVELAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-476

SEYMOUR GROSS, PETITIONER

v.

MEDICAL MUTUAL OF CLEVELAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The issue is whether a previous judgment dismissing petitioner's complaint for lack of jurisdiction bars this suit.

In 1971, petitioner filed a complaint in an Ohio state court against a government agent administering the Medicare insurance program, Medical Mutual of Cleveland, Inc., seeking damages or interest for unlawful and unreasonable delay in processing and paying claims of Medicare subscribers. The defendant removed the action under 28 U.S.C. 1442(a)(1) to federal district court, and that court dismissed the action for lack of jurisdiction (Pet. 6; Pet. App. 19-23). The petitioner filed a notice of appeal and then voluntarily withdrew it.

Subsequently, in 1972, the petitioner filed a complaint in federal district court against the same defendant alleging the same misconduct and seeking the same relief (Pet. 5-6; Pet. App. 15-18). The district court, treating the defendant's motion to dismiss as a motion for summary judgment, granted the motion on the ground that the prior judgment was *res judicata* (Pet. 6-7; Pet. App. 17-18). The court of appeals affirmed (Pet. App. 14).

The court below correctly dismissed this action as barred by *res judicata*. Further review by this Court is not warranted.

1. Petitioner argues that the dismissal for lack of jurisdiction in the first action is not *res judicata* in the second suit since under Rule 41(b) of the Federal Rules of Civil Procedure a dismissal for lack of jurisdiction is not an adjudication on the merits (Pet. 7). Petitioner's argument is based upon the theory that *res judicata* applies only to adjudications on the merits of an action. It is well settled, however, that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166. Accord, *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376-377; *Stoll* v. *Gottlieb*, 305 U.S. 165, 172-173; *Barzin* v. *Selective Service Local Board No. 14*, 446 F. 2d 1382, 1383 (C.A. 3); *Hadge* v. *Second Federal Savings and Loan Ass'n of Boston*, 409 F. 2d 1254, 1257 (C.A. 1); *Acree* v. *Air Line Pilots Ass'n*, 390 F. 2d 199, 203 (C.A. 5), certiorari denied, 393 U.S. 852; *Hicks* v. *Holland*, 235 F. 2d 183 (C.A. 6), certiorari denied, 352 U.S. 855; *Estevez* v. *Nabers*, 219 F. 2d 321, 323-324 (C.A. 5). See *Durfee* v. *Duke*, 375 U.S. 106. These cases establish that a

final determination of an action is conclusive in a subsequent suit as to the issues previously adjudicated, even though these issues are jurisdictional, rather than ones involving the merits of the case. In the instant case, the jurisdictional question had already been litigated and decided adversely to the petitioner in the prior suit so it could not be relitigated in the second action.[1]

2. Since petitioner's present action is barred by *res judicata,* the instant petition does not properly present the second issue which petitioner seeks to raise, *viz.,* whether the district court in the first suit erroneously ruled on the jurisdictional issues (Pet. 11).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] Neither of the cases cited by petitioner (Pet. 7-11) is apposite here. *Bell* v. *Hood,* 327 U.S. 678, did not deal with *res judicata* at all. *Costello* v. *United States,* 365 U.S. 265, held that the dismissal of a denaturalization proceeding for failure to file an affidavit of good cause—a prerequisite under the applicable statute—was a dismissal for lack of jurisdiction, and thus not an adjudication on the merits which would, under Rule 41(b), bar a subsequent denaturalization proceeding on the same facts. *Costello* thus involved the question of whether, once the original jurisdictional defect was cured, a subsequent suit was barred by the earlier dismissal. In contrast, petitioner here seeks simply to relitigate the earlier decision on the jurisdictional issue.

[0611-1973-10]

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1973

No. 73-476

SEYMOUR GROSS, PETITIONER

v.

MEDICAL MUTUAL OF CLEVELAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO
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THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONER

The four decisions of this Court cited by Respondent are not inconsistent with the Petitioner's position. In each of those cases the trial court had assumed jurisdiction and litigated the issues on the merits.

This Court stated the rule in Durfee v. Duke,

375 U.S. 106, 114:

> "...After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined...." (Underscoring supplied)

In the instant case the trial court in the first suit did not assume jurisdiction and the Petitioner did not have his day in court, with an opportunity to present his evidence and his view of the law.

Where the district court specifies in an order of dismissal the grounds thereof which do not involve the merits of the case, but rather the failure of a jurisdictional requirement, the dismissal does not operate as a dismissal on the merits and is not a bar to a subsequent suit after determination that the court has jurisdiction.

Madden v. Perry, 264 F. 2d 169 (C.A. 7), certiorari denied, 355 U.S. 831

U.S. v. Rand, 53 F. 348 (C.A. 1)

A dismissal for "lack of jurisdiction" is not res judicata.

Bell v. Hood, 327 U.S. 678

Costello v. United States, 365 U.S. 265

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Seymour Gross

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(Tel. 216 - 696-5060)

PROOF OF SERVICE

I, Seymour Gross, counsel for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of November, 1973, I served five (5) copies of the foregoing Reply Memorandum of Petitioner upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing the same, in a duly addressed envelope, with first class postage prepaid.

Seymour Gross

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